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July 9, 1997


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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY


**EX PARTE**

**VIA HAND DELIVERY**

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

**Re: Notification of Permitted *Ex Parte* Communications—Closed Captioning and Video Description of Video Programming Notice of Proposed Rulemaking MM Docket No. 95-176**

Dear Mr. Caton:

Pursuant to Sections 1.1206(b)(1) and (b)(2) of the Commission's Rules, Cole, Raywid & Braverman, on behalf of Outdoor Life Network, Speedvision Network, BET On Jazz, The Golf Channel and America's Health Network (collectively, "Networks"), hereby submits an original and one copy of this letter memorializing a permitted *ex parte* presentation in the referenced proceeding.

On Tuesday, July 8, 1997, Fred Epstien of Outdoor Life and Speedvision Networks, Ibn Spicer of BET On Jazz, Brian Hansen of America's Health Network, and Burt Braverman and James Tomlinson of Cole, Raywid & Braverman, met with Gretchen Rubin to discuss the issue of library programming and the Networks' proposed exemption for low-penetrated national basic



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cable networks. Also attached are two copies of a written *ex parte* communication provided to Ms. Rubin in this meeting. *See* Attachment A.

**Low-Penetrated Network Exemption**

The Networks summarized their position taken in Comments and in previous *ex parte* meetings that the Commission should exempt by regulation video programming distributed by low-penetrated national basic cable networks, *i.e.,* those that serve fewer than 20 million subscribers. In this regard, the Networks provided an analysis of the relative impact of captioning costs on various distributors of video programming. *See* Attachment A. This analysis demonstrates the disproportionate impact that a captioning mandate would impose on an emerging cable network relative to either an established cable network or a broadcast network. The Networks also discussed the feasibility of other possible methods by which the Commission might exempt other classes of small and/or emerging distributors of video programming (*e.g.,* exemptions for those distributors with less than a specified amount of annual revenue or the imposition of a cap on the annual captioning expense that a network would incur, expressed as a percentage of revenue). The Networks expressed their view that an exemption based on financial data, while clearly preferable to *no* exemption, would be less preferred than their proposed exemption, and that a "one-size-fits-all" exemption based on financial data (*e.g.,* revenue) may be difficult to administer across the video programming industry—whether within the cable programming industry or among all other video distribution media (*e.g.,* broadcast TV or LPTV). The Networks also suggested that the Commission consider subtracting certain costs incurred by the distributor or exempting a small and/or new video programming distributor until it becomes cash-flow positive.

**Library Programming**

The Networks emphasized that while their primary position is that the Commission should temporarily exempt them as a class because of their status as low-penetrated networks, they urged the Commission to consider that any mandate for the captioning of library programming to which they may be subject—either initially or after reaching the 20 million subscriber threshold—be reasonable, realistic and reflect the economic and competitive realities of the cable programming industry.

The Networks' expressed their concern that the Commission may be considering requiring the captioning of 75 percent of all library programming over a period of ten years. The Networks stated their view that this proposed recommendation (1) does not comport with the intent of Congress, (2) would have a disastrous financial impact on cable programming networks, and in particular newer networks, and (3) will not necessarily lead to the captioning of more library programming, but rather may lead programmers to avoid carriage of some of the most desirable and diverse library programming. The Networks urged the Commission, at least for the time-being, to allow market forces to determine the appropriate rate at which library programming will be captioned.

The Networks noted that because of the enormous cost of producing and acquiring new and original programming, cable networks, and new programming networks in particular, typically rely upon diverse library programming, especially during their formative years. For example, 70 percent of the programming distributed by Outdoor Life, and approximately 50 to 55 percent of the programming currently distributed by Speedvision, is library programming. Much of this programming, especially that produced prior to the mid-1980s, has never been captioned. The Networks stressed that a captioning requirement would create a substantial burden on cable networks. For example, it would cost Outdoor Life at least $2 Million to caption its library programming for one year alone. The Networks also noted that HBO has stated that it would take that network, which has a 6-person in-house captioning department, ***six years*** to caption the uncaptioned titles that aired on HBO and Cinemax in 1995 alone.[1]

The Networks provided examples of the library programming that they distribute, such as Speedvision's acquisition of vintage coverage of automobile races. This programming, like the Networks' other library programming, is selected because it is attuned to the specialized viewing interests of their subscribers. The Networks emphasized that if required to caption such library programming, they will be forced to forego much of this distinctive material, in favor or more mundane programming that already has been captioned—at direct cost to the *diversity* of programming available to all subscribers, including the hearing-impaired.

The Networks stressed that video programming networks need flexibility in designing their programming schedules and that a captioning mandate for library programming will distort the program selection process. It would be unwise and unsound policy for the Commission to artificially disrupt the Networks' program selection process because of cost concerns resulting from mandatory captioning of library programming. The Networks noted that a requirement that networks caption substantial amounts of library programming resulting in reduced diversity of library programming is clearly *not* what Congress intended. *See* House Report at 114 ("the Committee does not intend that the requirement for captioning should result in a [sic] previously produced programming not being aired due to the costs of the captions.").

The Networks also discussed the fact that the impact will be particularly harsh for new cable programming networks who cannot pass along additional captioning cost to MVPDs or their subscribers because new networks must give periods of free service in order to obtain carriage

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[1] HBO Reply Comments in Response to Notice of Inquiry at 11.

during their early years of operation. Under today's market conditions, it is not uncommon for these periods to extend for two, three, five years, or even longer, and even for networks to have to pay MVPDs to gain carriage. Moreover, cable programming networks are generally subject to long-term affiliation contracts, many with renewal and/or "most-favored nation" clauses that will prevent the Networks from passing along such costs to cable operators. As a result, the Networks stated that they will be forced either to increase the amount repeat programming they distribute or to avoid carriage of some of the most desirable library programming, which is uncaptioned, and instead to emphasize carriage of more mundane, previously-captioned material.

*Proposals Regarding Library Programming*

The Networks first recommended that the Commission adopt only voluntary guidelines, including specific goals and time tables, regarding the captioning of library programming, as contemplated by Congress and by the Commission in the NPRM. The Commission should then schedule a review following the end of the first new programming transition period (*e.g.*, two to four years after the adoption of captioning rules) to assess the progress that will occur in the captioning of both new and library programming. By proceeding in this manner, the Commission will be able to base any decision regarding library programming on information gathered in the context of a totality of captioned programming available to the hearing-impaired.

In the alternative, the Networks urged the Commission to adopt the proposal set forth by CBS, Inc. in its comments that all providers other than national broadcast networks be exempted from any requirement to caption library programming. However, should the Commission decline to adopt either of these alternatives, the Networks asked that the Commission adopt a proposal similar to that set forth by the Motion Picture Association of America: once a national basic cable network achieves a threshold of 20 million subscribers, it would be required to caption 50 percent of its library programming, phased in over a period of fifteen years.

If you need any additional information, please contact the undersigned.

Respectfully submitted,

James W. Tomlinson

Burt A. Braverman
James W. Tomlinson

cc: Gretchen Rubin

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| | Households Available | Household Rating | Households Viewing | CC cost per Hour | CC cost per HH |
|---|---|---|---|---|---|
| Broadcast Channel A | 97,000,000 | 8.0 | 7,760,000 | $800 | $0.0001 |
| Broadcast Channel B | 80,000,000 | 2.0 | 1,600,000 | $800 | $0.0005 |
| Established Cable Network A | 65,000,000 | 0.9 | 585,000 | $800 | $0.0014 |
| Established Cable Network B | 20,000,000 | 0.4 | 80,000 | $800 | $0.0100 |
| Emerging Cable Network A | 19,000,000 | 0.3 | 57,000 | $800 | $0.0140 |
| Emerging Cable Network B | 6,000,000 | 0.1 | 6,000 | $800 | $0.1333 |

Attachment A
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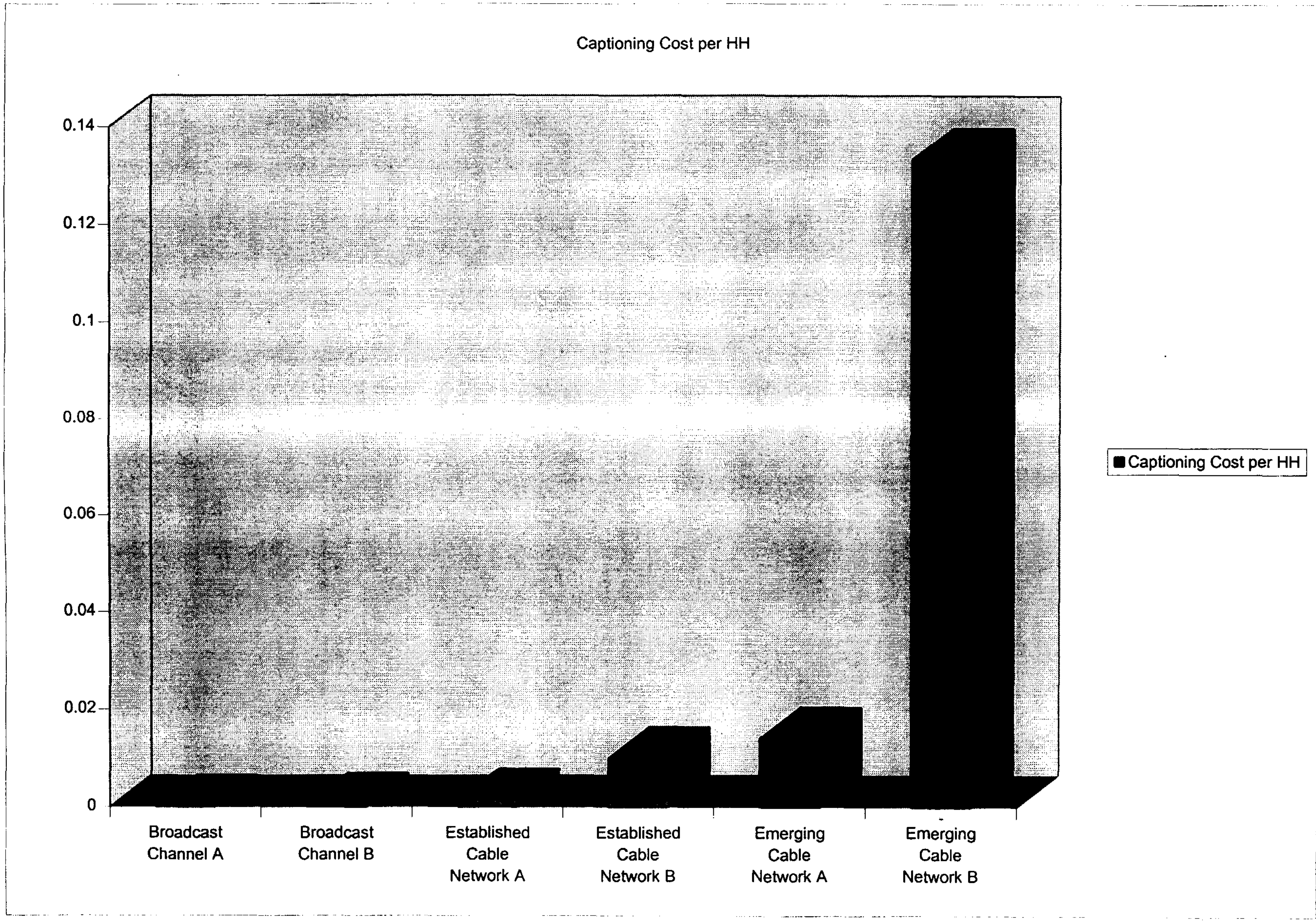


Attachment A
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